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No. 97-834

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ABE POLLIN, *et al.*,
Petitioners,

v.

PARALYZED VETERANS OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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351P

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. The Statute and the Regulation 3

B. The Justice Department's Consistent Interpretation 4

C. The Design of the MCI Center 6

D. The Litigation 6

REASONS FOR DENYING THE WRIT 9

I. THE LAW IS CLEAR ON THE DEGREE OF DEFERENCE DUE AN AGENCY'S INTERPRETATION OF ITS OWN REGULATION 9

A. For Half a Century, This Court Has Applied a Clear, Consistent Standard to Agency Interpretations of Regulations 9

B. There Is No Open Issue as to the Deference Afforded Regulatory Interpretations That Are Issued in "Informal Formats" 11

C. The Cases Cited by Petitioners Reveal No Conflict on Any Issue Presented by this Case 12

D. This Case Does Not Involve *Chevron*, and the Alleged Conflict Cited by Petitioners Could Not Be Decided Here 15

E. Petitioners Seek The Reversal of a Half-Century of Unquestioned Decisions Applying *Seminole Rock* 16

II. THERE IS NO SPLIT IN THE CIRCUITS ON HOW TO DISTINGUISH "INTERPRETATIVE" FROM "SUBSTANTIVE" RULES 17

A. Petitioners Miscite and Misread Authority 19

B. The Circuit Courts Agree That the "Impact" of an Interpretation Is Not Determinative 20

C. This Court Recently Has Offered Clear Guidance On This Precise Issue 22

III. THIS CASE IS A POOR VEHICLE FOR CONSIDERING THE QUESTIONS PRESENTED 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:	Page
American Hospital Association v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987)	23
American Postal Workers Union v. United States Postal Service, 707 F.2d 548 (D.C. Cir. 1983)	21
Anaheim Memorial Hospital v. Shalala, 130 F.3d 845 (9th Cir. 1997)	11
Atchison, T. & S.F. Ry. v. Pena, 44 F.3d 437 (7th Cir. 1994), *aff'd on other grounds sub nom., Brotherhood of Locomotive Engineers v. Atchison, T. & S.F. R.R.*, 516 U.S. 152 (1996)	13
Auer v. Robbins, 117 S. Ct. 905 (1997)	2, *passim*
Avol v. HHS, 883 F.2d 659 (9th Cir. 1989)	14
Board of Trustees of Knox County Hospital v. Shalala, 1998 WL 35149 (7th Cir. 1998)	11
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)	2, 7, 10, 11
Brown Express, Inc. v. United States, 607 F.2d 695 (5th Cir. 1979)	18
Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89 (1983)	14
Cal-Almond, Inc. v. USDA, 14 F.3d 429 (9th Cir. 1993)	18
Caruso v. Blockbuster-Sony Music Entertainment Center, 968 F. Supp. 210 (D.N.J. 1997)	25
Central Midwest Interstate Low-Level Radioactive Waste Commission v. Pena, 113 F.3d 1468 (7th Cir. 1997)	13
Chen Zhou Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995)	18
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	13, 15, 16

Chief Probation Officers v. Shalala,
118 F.3d 1327 (9th Cir. 1997) 14, 21
Chrysler Corp. v. Brown,
441 U.S. 281 (1979) 22-23
Comet Enterprise Ltd. v. Air-A-Plane Corp.,
128 F.3d 855 (4th Cir. 1997) 11
Dalheim v. KDFW-TV, 918 F.2d 521
(5th Cir. 1990) 14
Ehlert v. United States, 402 U.S. 99 (1971) 10
Elaine's Cleaning Serv., Inc. v. Department of Labor, 106 F.3d 726 (6th Cir. 1997) 11
Elizabeth Blackwell Health Center v. Knoll,
61 F.3d 170 (3d Cir. 1995), *cert. denied*,
516 U.S. 1093 (1996) 13, 21
First National Bank v. Sanders, 946 F.2d 1185
(6th Cir. 1991) 21
FLRA v. Department of the Navy, 966 F.2d 747
(3d Cir. 1992) 18, 21
Ford Motor Credit Co. v. Milhollin,
444 U.S. 555 (1980) 12, 14, 16, 24
General Motors Corp. v. Ruckelshaus,
742 F.2d 1561 (D.C. Cir. 1984) (*in banc*),
cert. denied, 471 U.S. 1074 (1985) 20
Headrick v. Rockwell International Corp.,
24 F.3d 1272 (10th Cir. 1994) 13, 19
Hoctor v. USDA, 82 F.3d 165 (7th Cir. 1996) 19, 20
Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698 (D. Ore. 1997) 25
INS v. Stanisic, 395 U.S. 62 (1969) 10
Interstate Brands Corp. v. Local 441 Retail, Wholesale & Department Store Union, AFL-CIO, 39 F.3d 1159 (11th Cir. 1994) 11
Jacks v. Crabtree, 114 F.3d 983 (9th Cir. 1997) .. 13
Kelley v. E.I. du Pont de Nemours & Co.,
17 F.3d 836 (6th Cir. 1994) 13
Knutzen v. Eben Ezer Lutheran Housing Center, 815 F.2d 1343 (10th Cir. 1987) 19

La Casa del Convaleciente v. Sullivan,
965 F.2d 1175 (1st Cir. 1992) 21, 22
Levesque v. Block, 723 F.2d 175 (1st Cir. 1983).. 21, 22
Love v. Tippy, 1998 WL 3141 (8th Cir. 1997) 11
Lyng v. Payne, 476 U.S. 926 (1986) 10
Metropolitan School District v. Davila,
969 F.2d 485 (7th Cir. 1992) 18, 20, 21
Motor Vehicle Manufacturer Association v. New York State Department of Environmental Conservation, 17 F.3d 531 (2d Cir. 1994) 13
Mullins Coal Co. v. Department of Labor,
484 U.S. 135 (1987) 10
New York v. Shalala, 119 F.3d 175 (2d Cir. 1997) 11
Northern Indiana Public Service Co. v. Izaak Walton League of America, Inc.,
423 U.S. 12 (1975) (per curiam) 10
Oklahoma v. Shalala, 42 F.3d 595
(10th Cir. 1994) 11
P. Gioioso & Sons, Inc. v. OSHRC,
115 F.3d 100 (1st Cir. 1997) 11
Ramey v. Gober, 120 F.3d 1239 (Fed. Cir. 1997). 11
Reich v. General Motors Corp., 89 F.3d 313
(6th Cir. 1996) 14-15
Reich v. John Alden Life Insurance Co.,
126 F.3d 1 (1st Cir. 1997) 13
Reno v. Koray, 515 U.S. 50 (1995) 14
Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 10
Rocky Mountain Helicopters, Inc. v. FAA,
971 F.2d 544 (10th Cir. 1992) 18, 19
Shalala v. Guernsey Memorial Hospital,
514 U.S. 87 (1995) ..... 10, *passim*
Shalala v. St. Paul-Ramsey Medical Center,
50 F.3d 522 (8th Cir. 1995) 14
Shell Oil Co. v. Babbitt, 125 F.3d 172
(3d Cir. 1997) 11

Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 2570 (1996) 13
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 13, 14
Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1st Cir. 1997) 13
Southern Ute Indian Tribe v. Amoco Production Co., 119 F.3d 816 (10th Cir. 1997) 13
Stinson v. United States, 508 U.S. 36 (1993) 10, 12, 23
Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994) 7, 10, 15
Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 10
Transamerica Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., 423 U.S. 28 (1975) 12
Travelstead v. Derwinski, 978 F.2d 1244 (Fed. Cir. 1992) 13
Udall v. Tallman, 380 U.S. 1 (1965) 10
United States v. Century Offshore Management Corp., 111 F.3d 443(6th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) 18
United States v. Ellerbe Becket, Inc., 976 F. Supp. 1262 (D. Minn. 1997) 25
United States v. Larionoff, 431 U.S. 864 (1977) .. 10
United States v. Piper, 35 F.3d 611 (1st Cir. 1994) 18, 22
United States v. Thompson, 687 F.2d 1279 (10th Cir. 1982) 19
United States v. Yuzary, 55 F.3d 47(2d Cir. 1995) 18
United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 19
United Technologies Corp. v. EPA, 821 F.2d 714 (D.C. Cir. 1987) 20

Visiting Nurse Association of North Shore v. Bullen, 93 F.3d 997 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 955 (1997) 14
White v. Bowen, 636 F. Supp. 1235 (S.D.N.Y. 1986), *aff'd*, 835 F.2d 974 (2d Cir. 1987) 21
WRT Energy Corp. v. FERC, 107 F.3d 314 (5th Cir. 1997) 11

Statutes:

Administrative Procedure Act, 5 U.S.C. §§ 551-559 2
Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213 3
5 U.S.C. § 553(b) 2
5 U.S.C. § 553(b)(3)(A) 11
29 U.S.C. § 792(b) 3
36 U.S.C. § 1151 7
42 U.S.C. § 12182(a) 3
42 U.S.C. § 12183(a)(1) 3
42 U.S.C. § 12186(b) 3, 16
42 U.S.C. § 12186(c) 3, 26
42 U.S.C. § 12188(b)(1) 3
42 U.S.C. § 12204(a) 3
42 U.S.C. § 12204(b) 3
42 U.S.C. § 12206(c)(1) 4
42 U.S.C. § 12206(c)(3) 3, 4, 16

Regulations:

28 C.F.R. Part 36, App. A, § 4.33.3 4
36 C.F.R. § 1191.1 3
56 Fed. Reg. 35408 (1991) 5
56 Fed. Reg. 35544 (1991) 4

Notices:

57 Fed. Reg. 60612 (1992) 5
59 Fed. Reg. 31676 (1994) 5
59 Fed. Reg. 48542 (1994) 25

Miscellaneous:

3 ACCESS CURRENTS (Nov./Dec. 1997) 26
Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal ..... Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311 (1992) 18
Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) 17
United States Department of Justice, *Title III Technical Assistance Manual* .....5, *passim*

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

To implement the equal-access mandate of Title III of the Americans With Disabilities Act, the Department of Justice in 1991 promulgated a regulation requiring "assembly areas" to provide wheelchair users "lines of sight comparable" to those of other spectators. The Department has consistently interpreted its regulation to mean that facilities where spectators can be expected to stand during the show (*e.g.*, professional sports arenas) must provide wheelchair users lines of sight over standing spectators.

In this case, the United States Court of Appeals for District of Columbia Circuit (per Judge Silberman, joined by Chief Judge Edwards and Judge Sentelle), held that the Department's "quite natural[]" interpretation of its regulation was entitled to judicial deference. A. 8a.[1] It thus affirmed an injunction requiring a substantial percentage of the wheelchair seating locations at the new MCI Center in Washington, D.C., to provide lines of sight unobstructed by standing spectators.

Petitioners now seek this Court's review of two questions, neither of which is in doubt. *First*, they ask the Court to decide how much deference is due an agency's interpretation of its own regulations. The Court answered this precise question, most recently, just last Term in *Auer v. Robbins*, 117 S. Ct. 905 (1997). *Auer* unanimously reaffirmed the long-standing rule that an agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Id.* at 911. The D.C. Circuit in this case relied on *Auer* and a half-century of precedent dating back to *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). A. 10a-11a. Petitioners offer no good reason for the Court to revisit this established rule.

Second, Petitioners ask the Court to rule on what distinguishes an "interpretative" rule from a "substantive" rule for purposes of the notice-and-comment requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b). Petitioners say there is a circuit split on this issue, but base their assertion in large part on a passage from a dissent that they portray as a holding. *See* p. 19, *infra*. In truth, the D.C. Circuit in this case applied the settled doctrine that a substantive rule "carries 'the force and effect of law,'" while an interpretative rule "spells out a duty fairly encompassed within the regulation that the interpretation

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[1] "A." refers to Petitioners' appendix, and "C.A.A." refers to the Court of Appeals appendix.

purports to construe." A. 18a. These same principles appear—in slightly different language, but without any practical distinction—in many decisions of this Court and the various courts of appeals. There is no circuit split for this Court to resolve.

A. The Statute and the Regulation.

Title III of the Americans With Disabilities Act ("ADA") broadly prohibits disability-based discrimination, requiring that persons with disabilities be provided "full and equal enjoyment" of public accommodations. 42 U.S.C. § 12182(a); A. 83a. It requires buildings opened after January 26, 1993, to be "readily accessible to and usable by individuals with disabilities." *Id.* § 12183(a)(1); A. 87a. Congress designated the United States Department of Justice as the sole federal agency with authority to enforce these requirements, and gave it responsibility to investigate and bring enforcement actions against violators. 42 U.S.C. § 12188(b)(1).

Congress also expressly directed the Justice Department to promulgate regulations "to carry out the provisions" of Title III. *Id.* § 12186(b); A. 88a. Congress gave the U.S. Architectural and Transportation Barriers Compliance Board (the "Access Board") a subsidiary, "advisory" role in the rulemaking process. 29 U.S.C. § 792(b). Congress directed the Access Board to "issue minimum guidelines" consistent with the ADA, 42 U.S.C. § 12204(a) & (b); A. 89a-90a, "to assist the Department of Justice" in developing its Title III regulations. 36 C.F.R. § 1191.1. Although the Justice Department's regulations must "be consistent with" the floor set by the Board's guidelines, 42 U.S.C. § 12186(c); A. 88a, the Department is free to impose more stringent accessibility obligations than contemplated by the Board. A. 16a.

Congress also tasked the Justice Department to provide guidance to "individuals or entities with rights or duties under" Title III. It instructed the Department, "as part of its

implementation responsibilities," to "ensure the availability of appropriate technical assistance manuals." 42 U.S.C. § 12206(c)(3); A. 91a. Congress also directed the Department to "render technical assistance" on a less formal basis to those affected by Title III. *Id.* § 12206(c)(1); A. 90a.

On July 26, 1991, after notice and comment, the Justice Department issued regulations implementing Title III. While relying on the Access Board's "minimum guidelines," the Department issued these rules as its own regulations. 56 Fed. Reg. 35544 (1991), *codified at* 28 C.F.R. Part 36 & App. A; A. 90a. The regulation addressing seating for wheelchair users in assembly areas states:

> Wheelchair areas . . . shall be provided so as to provide people with physical disabilities . . . lines of sight comparable to those for members of the general public.

Id. App. A, § 4.33.3; A. 104a.

B. The Justice Department's Consistent Interpretation.

The Department fulfilled the congressional directive to furnish technical assistance by issuing an interpretation of the comparable sightlines regulation in two basic forms:

First, beginning shortly after the new-construction provisions of the ADA became effective in early 1993, the Department alerted architects and developers through correspondence that it interpreted "comparable" lines of sight to mean "line[s] of sight over standing spectators." C.A.A. 1224. The Department first expressed this interpretation in letters concerning the Atlanta Olympic Stadium, and reiterated it in dozens of letters issued in conjunction with other Departmental investigations, and in response to inquiries by Members of Congress and the public. C.A.A. 406-65. Notably, the Department sent one of these letters, in November 1994, to the MCI Center's architects and its ADA attorney. C.A.A. 424.

Second, the Department interpreted its regulation in its congressionally mandated *Title III Technical Assistance Manual*. In the September 1994 update to the *Manual*—issued months before the first plans for the MCI Center were drawn—the Department explained:

> [This regulation] requires that wheelchair locations provide people with disabilities lines of sight comparable to those for members of the general public. *Thus, in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand.* This can be accomplished in many ways, including placing wheelchair locations at the front of a seating section, or by providing sufficient additional elevation for wheelchair locations placed at the rear of seating sections to allow those spectators to see over the spectators who stand in front of them.

Title III Technical Assistance Manual, ¶ III-7.5180; A. 115a (emphasis added).

In contrast to the Justice Department, the Access Board, which has no enforcement or interpretative role under the ADA, never offered an official interpretation of the phrase "comparable line of sight" in its minimum guidelines, and repeatedly declined to ascribe a specific meaning to it. 56 Fed. Reg. 35408, 35440 (1991); A. 97a; 57 Fed. Reg. 60612, 60618 (1992); 59 Fed. Reg. 31676, 31679 (1994).[2]

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[2] Petitioners imply that the Access Board *excluded* the possibility that its guideline could be read to require lines of sight over standing spectators. Pet. at 20. In fact, the Access Board has never resolved the issue. Its staff and consultants, however, have opined repeatedly that the Board's "comparable line of sight" guideline—like the Justice Department's analogous regulation—requires unobstructed sightlines. *E.g.*, C.A.A. 470 ("A comparable line of sight allows a person using a wheelchair to see the playing surface between the heads and over the shoulders of persons standing in the row immediately in front . . ."); *see also id.* at 423, 1422.

C. The Design of the MCI Center.

In late December 1994, the MCI Center's architects presented the Center's owner, Petitioner Abe Pollin, with an array of preliminary options for the arena's seating bowl. C.A.A. 968-77. Only one of these options offered well-distributed wheelchair locations with lines of sight over standing spectators.

Mr. Pollin initially selected this option, C.A.A. 968, but quickly became concerned that in this bowl design, the facility's luxury suites would not attract a high enough price. C.A.A. 978. To maximize revenues, Mr. Pollin abandoned his initial selection and opted instead for a design that provided obstructed sightlines for wheelchair users at most locations. C.A.A. 991.

The architects and Mr. Pollin's ADA attorney—all of whom were aware of the Justice Department's long-standing interpretation of its comparable sightlines regulation and, specifically, its September 1994 update to the *Technical Assistance Manual*—warned Mr. Pollin that the Department interpreted its regulation to mean that wheelchair users must be provided lines of sight over standing spectators. As the Court of Appeals rightly observed, "there is no question but that [Petitioners] were on notice of Justice's interpretation" when they selected the design for the spectator seating bowl that the District Court found to be unlawful. A. 17a.

Mr. Pollin nonetheless chose to defy the Department. Notes of the design team meetings reveal Mr. Pollin saying he "doesn't want to lose seats for wheelchair seating." C.A.A. 501. Other notes of his statements are even more explicit: "Abe says he's not going 'to do' the handicapped seating. Abe doesn't think he's going to have to comply." C.A.A. 497, 500.

D. The Litigation.

Four wheelchair users and the Paralyzed Veterans of America, a congressionally chartered organization

representing honorably discharged veterans of the armed forces with spinal cord injuries or disease, *see* 36 U.S.C. § 1151 *et seq.*, filed this suit under the ADA. After a week-long bench trial, the District Court (Hogan, J.) found that the MCI Center's original design "ghettoized" wheelchair users, A. 58a, and was unlawful and discriminatory. A. 75a. The Court entered a permanent injunction requiring design changes, including modifications to the arena to provide well-dispersed wheelchair locations, a substantial percentage of which offer lines of sight over standing spectators. A. 76a.

The D.C. Circuit affirmed the District Court in all respects. Judge Silberman, writing for the Court, held:

First, contrary to Petitioners' claim that the term "lines of sight comparable" had "for years . . . been understood" as not requiring "views over spectators who stand," Pet. at 3, at the time the Justice Department issued its regulation "[t]he words simply had not taken on a well-understood meaning." A. 9a. Thus, the regulation "quite naturally is interpreted to refer to the ability of a wheelchair user to see a performance without any obstruction," as stated in the Justice Department's *Technical Assistance Manual*. A. 9a.

Second, the Department's interpretation of its comparable sightlines regulation is entitled to deference under principles established by a long line of Supreme Court precedents:

> Agency interpretations of their own regulations have been afforded deference by federal reviewing courts for a very long time and are sustained unless "plainly erroneous or inconsistent" with the regulation. *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

A. 10a.

Third, the regulation at issue is properly considered the Justice Department's "own regulation," to which these traditional deference rules apply. A. 13a. While the Access

Board played a role in drafting the regulation, "the doctrine of deference is based primarily on the agency's statutory role as the sponsor of the regulation," A. 12a, and on the agency's "delegated authority to administer the [regulation]." A. 13a. Both lie with the Justice Department here.

Fourth, with respect to the deference analysis, it is also "significant" that Congress "specifically requir[ed] the publication of a technical manual that would further refine or interpret in detail the regulation's substantive obligations." A. 13a-14a. This reveals that Congress "contemplated a continuing administration of the regulation that approaches, if not equates with, the adjudicatory authority of other statutory schemes." *Id.*

Fifth, the Department's interpretation of the regulation in the *Technical Assistance Manual* did not, as Petitioners claimed, "constitute[] a fundamental modification of its previous interpretation," A. 14a, since the Department had "never authoritatively adopted a position contrary to its manual interpretation." A. 18a. The agency's interpretation thus was not an improper attempt to amend that regulation. *Id.*[3]

Sixth, the Department's explanation of the regulation's meaning in the *Technical Assistance Manual* "spells out a duty fairly encompassed within the regulation" itself. A. 18a. Accordingly, it is "interpretative," not "substantive," and did not require notice-and-comment rulemaking. Indeed, "the government could have relied on the regulation itself, even without the manual interpretation, to seek lines of sight over standing spectators." A. 19a. Because the "interpretation is

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[3] Although the Court of Appeals called the contention that the agency had "switch[ed]" its interpretation Petitioners' "most powerful argument," A. 14a, this contention is neither encompassed in the questions presented nor addressed in the body of the Petition. Thus, the legal standard applicable when an agency switches its interpretative position is not presented for review in this case.

not sufficiently distinct or additive to the regulation," it is a valid interpretative rule. *Id.*

Petitioners' request for rehearing and rehearing *in banc* by the D.C. Circuit did not garner a single vote. A. 23a, 24a. They now seek review solely of the appellate court's second and sixth holdings.

REASONS FOR DENYING THE WRIT

I. THE LAW IS CLEAR ON THE DEGREE OF DEFERENCE DUE AN AGENCY'S INTERPRETATION OF ITS OWN REGULATION.

Petitioners ask the Court to provide "guidance" on "the extent of agency power to make law by interpreting regulations in issuances in informal formats." Pet. at 9. But there is absolutely no need for the Court to provide "guidance" on the deference due an agency's regulatory interpretation, because it has done so already in an unbroken string of decisions over the last fifty years—precedents the D.C. Circuit correctly applied.

Judging from the only alleged circuit split Petitioners identify, their real request is that the Court use this case to decide the degree of deference due an agency's interpretation of its governing *statute*. This case, however, involves only a dispute about an agency's interpretation of its own *regulation*, not a dispute about an agency's interpretation of statutory provisions. This Court has made clear that these two distinct questions are governed by separate lines of authority. The Court should not grant certiorari to resolve an alleged circuit split on a question that has no bearing on this case.

A. For Half a Century, This Court Has Applied a Clear, Consistent Standard to Agency Interpretations of Regulations.

For over fifty years, the federal courts have consistently applied a single test to describe the deference due to an

administrative agency when it interprets a regulation it enforces. The test was first stated by this Court in 1945 in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417 (1945), and the Court has reiterated it time and again, as recently as last Term in *Auer v. Robbins*, 117 S. Ct. 905, 912 (1997). Under this established rule, an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer*, 117 S. Ct. at 911 (quoting *Seminole Rock*).[4] As the D.C. Circuit accurately stated, "[a]gency interpretations of their own regulations have been afforded deference by federal reviewing courts for a very long time." A. 10a.

Given this Court's frequent repetition of this principle, it is scarcely surprising that the circuits unanimously follow it, and have for decades. Each year, the federal courts confront scores of cases involving agency interpretations of regulations. Each circuit applies the same test in such cases—the deferential standard first announced in *Seminole Rock*. Contrary to Petitioners' assertion, the federal circuits are not "divided and confused" on this issue. Pet. at 8.[5]

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[4] *See also, e.g., Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 94-95 (1995); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Mullins Coal Co. v. Department of Labor*, 484 U.S. 135, 159 (1987); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *United States v. Larionoff*, 431 U.S. 864, 873 (1977); *Northern Indiana Public Service Co. v. Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975) (per curiam); *Ehlert v. United States*, 402 U.S. 99, 105 (1971); *INS v. Stanisic*, 395 U.S. 62, 72 (1969); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 276 (1969); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). Even the "dissenting Justices" cited by Petitioners as questioning this standard, Pet. at 22, were in agreement that the *Seminole Rock* cases provide the governing deference rule. *See Guernsey Memorial Hospital, supra*, 514 U.S. at 103 (O'Connor, J., dissenting); *Thomas Jefferson Univ.*, 512 U.S. at 519 (Thomas, J., dissenting).

[5] Every one of the federal circuits has recently applied the test established in *Seminole Rock* and its progeny as the standard for

B. There Is No Open Issue as to the Deference Afforded Regulatory Interpretations That Are Issued in "Informal Formats."

Notwithstanding a half-century of consistent case law granting deference to agencies' regulatory interpretations, Petitioners conjure up a supposedly open question as to whether regulatory interpretations issued in "informal formats" should receive less deference. Pet. at 9. This alleged conflict is nonexistent.

By definition, agency interpretations of regulations—"interpretative rules" in the parlance of the APA, 5 U.S.C. § 553(b)(3)(A); A. 82a—are not required to go through notice and comment. *Id.* In fact, virtually all of them are "issued without complying with the APA's formal rulemaking requirements." Pet. at 10. This has never been relevant to this Court's deference analysis. In the landmark case of *Seminole Rock*, this Court deferred to precisely such an "informal" statement—an agency's interpretation of its regulation expressed in an administrative "bulletin" and a "quarterly report" to Congress. 325 U.S. at 417. This Court has deferred to similar "informal" agency statements in many cases since *Seminole Rock*.[6] Just last Term, in *Auer v.*

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deference to an agency's interpretation of its regulations: *See, e.g., P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 107 (1st Cir. 1997); *New York v. Shalala*, 119 F.3d 175, 182 (2d Cir. 1997); *Shell Oil Co. v. Babbitt*, 125 F.3d 172, 176-77 (3d Cir. 1997); *Comet Enter. Ltd. v. Air-A-Plane Corp.*, 128 F.3d 855, 859 (4th Cir. 1997); *WRT Energy Corp. v. FERC*, 107 F.3d 314, 318 (5th Cir. 1997); *Elaine's Cleaning Serv., Inc. v. Department of Labor*, 106 F.3d 726, 729 (6th Cir. 1997); *Board of Trustees of Knox County Hosp. v. Shalala*, 1998 WL 35149 at *5 (7th Cir. 1998); *Love v. Tippy*, 1998 WL 3141 at *1 n.6 (8th Cir. 1997); *Anaheim Memorial Hosp. v. Shalala*, 130 F.3d 845, 849-50 (9th Cir. 1997); *Oklahoma v. Shalala*, 42 F.3d 595, 598 (10th Cir. 1994); *Interstate Brands Corp. v. Local 441 Retail, Wholesale & Dep't Store Union, AFL-CIO*, 39 F.3d 1159, 1163 (11th Cir. 1994); *Ramey v. Gober*, 120 F.3d 1239, 1246 (Fed. Cir. 1997).

[6] *See, e.g., Guernsey Mem'l Hosp.*, 514 U.S. at 90 (deferring to agency's "informal . . . guideline" that "does not purport to be a

Robbins, the Court deferred to an agency's regulatory interpretation explained in "a legal brief" filed by the Secretary of Labor as *amicus curiae* in the very litigation in which the Court's ruling was issued. 117 S. Ct. at 912.[7]

The Petitioners' casual treatment of *Auer* is particularly remarkable. *See* Pet. at 17-18. Far from failing to "decide" the "unresolved issue presented here," as Petitioners claim, *id.*, the Court expressly addressed the argument that the "form" of the agency's regulatory interpretation should change the deference rule applied. The Court held, unanimously, that an agency's interpretation is not "unworthy of deference" simply because it is announced in an informal format, such as the *amicus* brief in *Auer*. 117 S. Ct. at 912.

C. The Cases Cited by Petitioners Reveal No Conflict on Any Issue Presented by this Case.

Not one of the dozens of cases cited by Petitioners actually supports their claim that the Circuits are "deeply split" on the deference due to an agency's regulatory interpretation issued in "informal interpretative statements." Pet. at 10. Almost all of Petitioners' cases involve an agency's interpretation of

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regulation and has not been adopted pursuant to the notice-and-comment procedures of the Administrative Procedures Act"); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 563 & n.8 (1980) (deferring to agency memo setting forth an "Official Staff Interpretation" and several "Public Information Letters"); *Stinson v. United States*, 508 U.S. 36, 45 (1993) (deferring to agency's interpretive "commentary"); *Transamerica Freight Lines, Inc. v. Brada Miller Freight Sys., Inc.*, 423 U.S. 28, 42 n.7 (1975) (deferring to agency interpretation expressed in *amicus* brief).

[7] Contrary to Petitioners' suggestion, this Court has not assigned any relevance to whether an agency's regulatory interpretation was announced in an "agency adjudication" or an interpretative rule. Pet. at 9. In fact, this Court has treated these as equivalent, contrasting both with notice-and-comment rulemaking. *See, e.g., Guernsey Memorial Hosp.*, 514 U.S. at 89-90 (addressing the agency's "authority to resolve certain . . . issues by adjudication and interpretive rules, rather than by regulations").

a *statute*, not an agency interpretation of its own *regulation*. *See* Pet. at 11-15.[8]

Since the 1940's, the federal courts have observed a clear distinction between the rules of deference for agency interpretations of regulations, *see Seminole Rock* (decided in 1945), and the deference rules governing agency interpretations of statutes, *see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). This Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), governs only the latter line of cases.[9]

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[8] *See, e.g., Central Midwest Interstate Low-Level Radioactive Waste Comm'n v. Pena*, 113 F.3d 1468, 1473 (7th Cir. 1997) (agency's "interpretation of an ambiguous statute"); *Atchison, T. & S.F. Ry. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994) ("agency's adoption of its statutory interpretation"), *aff'd on other grounds sub nom., Brotherhood of Locomotive Eng'rs v. Atchison, T. & S.F. R.R.*, 516 U.S. 152 (1996); *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (agency's "reading of the Act"); *Southern Ute Indian Tribe v. Amoco Production Co.*, 119 F.3d 816, 830 (10th Cir. 1997) ("agency construction of a statutory term"); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 5, (1st Cir. 1997) (agency's interpretation of "'administrative employees' under the [Fair Labor Standards Act]"); *Travelstead v. Derwinski*, 978 F.2d 1244, 1250 (Fed. Cir. 1992) (agency's "[l]egal interpretations of a statute"); *Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 531 (2d Cir. 1994) (agency's "statutory construction"); *Kelley v. E.I. du Pont de Nemours & Co.*, 17 F.3d 836, 841 (6th Cir. 1994) (agency's "interpretation of a statute"); *Elizabeth Blackwell Health Ctr. v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995) (agency's "construction of a statutory scheme"), *cert. denied*, 516 U.S. 1093 (1996); *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1141 (4th Cir. 1995) (agency's "interpretation of the statute"); *cert. denied*, 116 S. Ct. 2570 (1996); *Jacks v. Crabtree*, 114 F.3d 983, 984 (9th Cir. 1997) (agency construction of "enabling statute"); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 14 (1st Cir. 1997) (agency's "interpretation of the ADA and of the Maine Human Rights Act").

[9] *Compare Auer*, 117 S. Ct at 909 (applying *Chevron* to the Secretary's "interpretation of the statutory exemption") *with id.* at 911 (applying *Seminole Rock* to an interpretation "of the Secretary's own regulations").

It may or may not be an open question whether a particular agency's interpretation of its enabling statute issued in an "informal format," rather than through notice-and-comment rulemaking, should get "*Chevron*-level" deference, or should be subject to a less deferential standard such as that set forth in *Skidmore*.[10] But even if this *statutory* interpretation issue were an open question, the law has been clearly settled since at least 1945 in the context of *regulatory* interpretations—*Seminole Rock* deference applies. The federal courts are not confused on this question. *See* p. 13 n.8, *supra*.[11]

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[10] In fact, this Court has already given "guidance" with respect to this issue as well. *See, e.g., Reno v. Koray*, 115 S. Ct. 2021, 2027 (1995) (finding *Chevron* deference due agency's interpretation of statute though "[i]t is true that the Bureau's interpretation appears only in a 'Program Statement'—an internal agency guideline—rather than in 'published regulations subject to the rigors of the Administrative Procedures Act"); *see also, e.g., Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 563, 566 & n.9 (1980).

[11] In the same vein, Petitioners try to sow the seeds of confusion by suggesting, alternatively, that the issue in conflict is whether informal agency interpretations are "binding" and have the "force and effect of law." *See* Pet. at 12-13 (citing *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1333 (9th Cir. 1997); *Avol v. HHS*, 883 F.2d 659, 661 (9th Cir. 1989); *Dalheim v. KDFW-TV*, 918 F.2d 521 1220, 1228 (5th Cir. 1990)). The proposition that interpretative rules do not have the force of law is both noncontroversial and undisputed. The question here is whether the *Technical Assistance Manual* is entitled to deference, not whether it is "binding," a point the Court of Appeals well understood. *See* A. 14a ("we . . . defer to the Department's reasonable interpretations of its regulation as set forth in the technical manual"). Other than the foregoing precedents, which are irrelevant, the only other cases cited by Petitioners actually *support* the Respondents' point that the governing deference test is not in controversy. *See Shalala v. St. Paul-Ramsey Med. Ctr.*, 50 F.3d 522, 528 (8th Cir. 1995) (regulatory interpretation is entitled to deference unless "plainly erroneous or inconsistent with" the regulation); *Visiting Nurse Ass'n of North Shore v. Bullen*, 93 F.3d 997, 1002 (1st Cir. 1996) (same), *cert. denied*, 117 S. Ct. 955 (1997); *Reich v. General Motors Corp.*, 89 F.3d 313, 315 (6th Cir. 1996) ("reasonable"

D. This Case Does Not Involve *Chevron*, and the Alleged Conflict Cited by Petitioners Could Not Be Decided Here.

Faced with fifty-years-worth of consistent precedent following *Seminole Rock*, Petitioner tries to muddy these clear waters by suggesting that this case actually involves the application of *Chevron*. This argument is built upon a seriously flawed reading of the decision below.

Chevron describes the degree of deference due "an agency's construction of the statute which it administers." 467 U.S. at 842. There is no contention in this case, however, that the agency misapplied the relevant statute, the ADA, in promulgating its comparable sightlines regulation. The only issue in this case is whether the Justice Department's interpretation of its regulation to require lines of sight over standing spectators is entitled to deference. As the D.C. Circuit accurately stated, this "case involves just the proper interpretation of the regulation." A. 7a. Thus, the court applied the established standard for deference to an agency's regulatory interpretation. A. 10a (citing *Thomas Jefferson Univ.*, 512 U.S. at 504, and *Seminole Rock*, 325 U.S. at 414).

Notwithstanding the clarity of Judge Silberman's opinion, Petitioners contend that the D.C. Circuit extends "*Chevron*-level deference" to an informal agency regulatory interpretation, Pet. at 10, and thereby "mandate[s] a level of judicial deference to informally adopted agency interpretations going beyond any that this Court has ever prescribed or permitted." Pet. at 19. Petitioners warn, in dire terms, that "even the *Seminole Rock* line of cases never went so far as the D.C. Circuit did here." *Id.* at 21.

There is no need for such hysteria. The D.C. Circuit neither applied *Chevron* nor suggested that *Chevron* would

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construction of ambiguous regulation is entitled to "substantial deference").

or should be the governing precedent in considering whether to defer to an agency's interpretation of a regulation. The only two substantive mentions of *Chevron* in the D.C. Circuit's decision appear, first, in *dicta* comparing the levels of deference afforded under *Seminole Rock* and *Chevron*, A. 10a, 15a, and, second, in the court's rejection of the government's "bold, complete analogy to *Chevron*" on the separate question whether notice and comment was required. A. 15a.

Far from going beyond "even the *Seminole Rock* line of cases," Pet. at 21, this case is well within this Court's prior deference decisions. Congress expressly charged the Justice Department to promulgate regulatory standards to implement the ADA, and the Department duly issued its own regulations, after notice and comment, to implement that Act. 42 U.S.C. § 12186(b). Thereafter, the Department complied with a specific congressional mandate to issue "technical assistance manuals" to provide guidance and explain its interpretation of those standards. 42 U.S.C. § 12206(c)(3). When the agency issued a regulatory interpretation to carry out that express congressional directive, it was acting at the height of its powers.[12] This case, therefore, would be a particularly unsuitable vehicle for this Court to reconsider established deference principles, even if it were inclined to do so.

E. Petitioners Seek The Reversal of a Half-Century of Unquestioned Decisions Applying *Seminole Rock*.

Petitioners' true intentions are revealed in their final argument addressing deference, which relies heavily on a recent law review article arguing that *Seminole Rock* should be abandoned as the standard for deference to agency regu-

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[12] *See, e.g., Ford Motor Credit Co.*, 444 U.S. at 567-68 (where Congress evinces a "decided preference" to "treat administrative rulemaking and interpretation as authoritative," courts "should honor that congressional choice" by deferring to the agency).

latory interpretations. Pet. at 19-22 (citing Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614 (1996)). Petitioners ask this Court to reverse a half-century of consistent case law that has "'gone unquestioned' since 1945" in order to adopt a provocative argument in a law journal article whose author candidly admits that "*Seminole Rock* deference . . . has long been one of the least worried-about principles of administrative law." Manning, *supra*, at 614. Clearly, the views of a single law review author that fifty years of "unquestioned" precedent should be jettisoned is not an adequate basis for a grant of certiorari. The D.C. Circuit rightly rejected the invitation to adopt Professor Manning's views. A. 10a n.2. So should this Court.

II. THERE IS NO SPLIT IN THE CIRCUITS ON HOW TO DISTINGUISH "INTERPRETATIVE" FROM "SUBSTANTIVE" RULES.

Citing a string of precedent stretching back almost two decades, A. 18a-19a, the D.C. Circuit (acknowledged by Petitioners as the "premier Circuit for federal regulatory litigation," Pet. at 8), applied the settled test to distinguish an interpretative rule from a substantive rule. The court said:

> We . . . look to whether the interpretation itself carries "the force and effect of law," or rather whether it spells out a duty fairly encompassed within the regulation that interpretation purports to construe. . . . The distinction between an interpretative and substantive rule . . . turns on how tightly the agency's interpretation is drawn linguistically from the actual language of the statute or rule.

A. 18a-19a (citations omitted). This description of the governing standard is echoed in the decisions of the other courts of appeals, which look to whether an interpretative

rule "clarifies," "defines," or "explains" a substantive rule.[13] It is also the standard endorsed by Robert Anthony, Petitioners' commentator-of-choice.[14]

Petitioners nevertheless claim that the D.C. Circuit's "linguistic test," Pet. at 8, creates a three-way split in the circuits. Petitioners never identify the three supposedly

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[13] *See, e.g., United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994) (interpretative rule valid because it "comports sufficiently with the letter, spirit, and aim of the" regulation); *United States v. Yuzary*, 55 F.3d 47, 51-52 (2d Cir. 1995) ("it is the proper function of interpretative rules to clarify ambiguities" in regulations); *FLRA v. Department of the Navy*, 966 F.2d 747, 762 n.14 (3d Cir. 1992) (*in banc*) ("In determining whether a rule is interpretive or substantive we may look to the nature of the rule itself: If the rule in question merely clarifies or explains existing law or regulations, it will be deemed interpretive") (internal quotation omitted); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1340-41 (4th Cir. 1995) ("interpretive rules simply state what the administrative agency thinks a statute means, and only remind affected parties of existing duties"); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 & n.5 (5th Cir. 1979) (finding rule not interpretative because it was not a "clarification" that "defines . . . [an] ambiguous term" in regulation); *United States v. Century Offshore Mgmt. Corp.*, 111 F.3d 443, 453 (6th Cir. 1997) (an "interpretive rule is one issued by an agency to advise the public of the agency's construction of the . . . rules which it administers") (internal quotation omitted), *cert. denied*, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998); *Metropolitan School Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992) ("interpretive rules are statements as to what the administrative officer thinks the . . . regulation means") (internal quotation omitted); *Cal-Almond, Inc. v. USDA*, 14 F.3d 429, 447-48 (9th Cir. 1993) (interpretative rules are "those which merely clarify or explain existing . . . regulations"); *Rocky Mountain Helicopters, Inc. v. FAA*, 971 F.2d 544, 546-47 (10th Cir. 1992) ("[a] rule is interpretative if . . . it attempts to clarify an existing rule but does not change existing law, policy, or practice").

[14] Professor Anthony, on whom Petitioners extensively rely, *see* Pet. at ix, agrees that the APA does not mandate notice-and-comment rulemaking for rules that interpret "tangible" or "specifically-worded" or "sufficiently concrete" language in a regulation. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like – Should Federal Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311, 1313, 1339, 1349 (1992).

conflicting standards—their second question presented suggests only two competing approaches. More fundamentally, Petitioners' claim of a circuit split is predicated entirely on improper citation and misreading of relevant authority. There is no circuit split.

A. Petitioners Miscite and Misread Authority.

Petitioners rely heavily on what they say is the "hold[ing]" of a Tenth Circuit case, *United States v. Thompson*, 687 F.2d 1279 (10th Cir. 1982), quoting it at length in their petition. Pet. at 23. *But Petitioners are quoting the dissenting opinion in Thompson. Id.* (quoting 687 F.2d at 1295). Chief Judge Seth's majority opinion for the *in banc* court—the Tenth Circuit's actual "holding" in *Thompson*—takes a very different position from Judge McKay's dissent on how to distinguish an interpretative rule from a substantive one. *Compare* 687 F.2d at 1283 (Seth, C.J.) *with id.* at 1295 (McKay, J., dissenting). As this Court has made clear, "[t]he comments in the dissenting opinion . . . are just that: comments in a dissenting opinion." *United States R. Retirement Bd. v. Fritz*, 449 U.S. 166, 177 n.10 (1980).

Moreover, recent Tenth Circuit cases embrace a test essentially identical to the rule applied by the D.C. Circuit here: "A rule is interpretive if it . . . attempts to clarify an existing rule but does not change existing law, policy, or practice." *Rocky Mountain Helicopters*, 971 F.2d 544, 546-47 (10th Cir. 1992); *see also, e.g., Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir. 1994) (per White, J., sitting by designation) (interpretive rules "help clarify the meaning and application of . . . promulgated rules"); *Knutzen v. Eben Ezer Lutheran Housing Ctr.*, 815 F.2d 1343, 1351-52 (10th Cir. 1987) (same). Petitioners notably do not cite any of these more recent, and controlling, Tenth Circuit opinions.

Petitioners' reliance on *Hoctor v. USDA*, 82 F.3d 165 (7th Cir. 1996), fares no better. Petitioners describe the "holding" in *Hoctor* as "irreconcilable with the D.C. Circuit's" holding

in this case. Pet. at 23. In fact, it is indistinguishable. The *Hoctor* court defined an interpretive rule as one

> that can be derived from the regulation by a process reasonably described as interpretation. *Metropolitan School Dist. v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992). . . . "Interpretation" in the narrow sense is the ascertainment of meaning.

82 F.3d at 170. There is no functional difference between this definition and the one employed by the D.C. Circuit. Both look to whether what purports to be an interpretation can be "derived from the regulation" (or, in the D.C. Circuit's formulation, can be "drawn linguistically from the actual language of the . . . rule").

This similarity is hardly surprising, since the case *Hoctor* cites as support for its rule, *Davila*, explicitly holds that the D.C. Circuit "has set forth the general principles to be used to determine whether a rule is interpretive, and, therefore, exempt from APA's notice and comment requirements." *See Davila*, 969 F.2d at 489 (citing, *inter alia*, *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (*in banc*), *cert. denied*, 471 U.S. 1074 (1985), and *United Technologies Corp. v. EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987)). The D.C. Circuit, in this case, relied on the same precedents. A. 18a-19a (citing, *inter alia*, *United Technologies*, 821 F.2d at 719-20). Petitioners' alleged circuit split amounts to nothing more than nitpicking over functionally identical language; they fail to identify any substantive conflict.

B. The Circuit Courts Agree That the "Impact" of an Interpretation Is Not Determinative.

Contrary to Petitioners' claim, there is also no split in the circuits on whether the "real-world impact" of an interpretation determines whether it must go through notice-and-comment rulemaking. Pet. at 25. Long ago, the D.C. Circuit held that "the impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules

may have a substantial impact on the rights of individuals." *American Postal Workers Union v. United States Postal Service*, 707 F.2d 548, 560 (D.C. Cir. 1983).

As Petitioners themselves note, the Third, Sixth, and Ninth Circuits agree with the D.C. Circuit and have held explicitly that an interpretative rule may be valid notwithstanding its substantial impact on the regulated community. Pet. at 24, citing *Elizabeth Blackwell Health Ctr. v. Knoll*, 61 F.3d 170 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 816 (1996); *First Nat'l Bank v. Sanders*, 946 F.2d 1185, 1189 n.2 (6th Cir. 1991); *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1335 (9th Cir. 1997). The Second and Seventh Circuits also agree. *See White v. Bowen*, 636 F. Supp. 1235, 1241 (S.D.N.Y. 1986) ("[i]n drawing the line between substantive and interpretative rules, the Second Circuit no longer looks to the impact of the rule"), *aff'd*, 835 F.2d 974 (2d Cir. 1987); *Davila*, *supra*, 969 F.2d at 493 ("Prevailing authority rejects the proposition that a rule that has substantial impact is necessarily legislative.").

Petitioners cite only one case, *La Casa del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992), that even remotely considers a rule's "impact." Pet. at 23-24.[15] But the *La Casa* court, while citing dated First Circuit precedent suggesting "impact may be relevant," *Levesque v. Block*, 723 F.2d 175, 182 (1st Cir. 1983), did not say that "impact" could ever be determinative, *La Casa*, 965 F.2d at 1178, and *Levesque* itself makes clear that "substantial impact *does not*

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[15] Along with *La Casa*, Petitioners also rely (explicitly this time) on the dissenting opinion in *Elizabeth Blackwell*, 61 F.3d at 187 (Nygaard, J., dissenting). Pet. at 24. Needless to say, Judge Nygaard's dissent is no more probative of a circuit split than is Judge McKay's. Furthermore, the *in banc* Third Circuit has adopted a test to distinguish substantive from interpretative rules, based on D.C. Circuit precedent, that is functionally identical to the rule employed in this case. *See FLRA v. Department of the Navy*, *supra*, 966 F.2d at 762 n.14.

make a rule legislative . . . ." 723 F.2d at 182 (emphasis added).

Moreover, the *La Casa* court noted that "[o]ther circuits . . . have moved away from considering the level of impact on interested parties as a factor in correctly classifying a rule or regulation." 965 F.2d at 1178 (citing cases). The court ultimately held that the rule before it was interpretative, using a test that echoes the test applied by the D.C. Circuit here: the interpretation was permissible because it was "a form of interpolation necessary to fill in where numbers are missing" from the regulation. *Id.* at 1179 (internal quotation omitted). More recent First Circuit precedent makes no mention of "impact" in assessing the validity of an interpretative rule. *Piper*, 35 F.3d at 617

C. This Court Recently Has Offered Clear Guidance On This Precise Issue.

Petitioners' final claim, that this Court has offered "no guidance . . . on what constitutes an 'interpretative' rule," Pet. at 22-23, is simply inaccurate.

Less than three years ago, this Court considered whether an informal interpretive "guideline" issued by the Secretary of Health and Human Services "is invalid because [the Secretary] did not follow the notice-and-comment provisions of the [APA] in issuing it." *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 90 (1995). This Court held that the Secretary's interpretation of her regulation was permissible (and entitled to deference), notwithstanding its informal origins, because it supplied details "unaddressed by the otherwise comprehensive regulations on [the] particular subject" of the regulation. *Id.* at 97. The Court explained:

> [The guideline] is a prototypical example of an interpretive rule "'issued by an agency to advise the public of the agency's construction of the . . . rules which it administers.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n. 31 (1979) (quoting Attorney

> General's Manual on the Administrative Procedure Act 30, n. 3 (1947)).

Id. at 99. Justice O'Connor dissented, but her disagreement focused on the *application* of the legal standard to the facts, not the definition of an interpretative rule. In language closely resembling the "linguistic" standard articulated by the Court of Appeals here, Justice O'Connor stated:

> [I]nterpretive rules . . . describe what the agency believes the . . . existing regulations require but . . . do not alter the substantive obligations created thereby. Such interpretive rules . . . must *explain* existing law and not *contradict* what the regulations require.

Id. at 111 (O'Connor, J., dissenting).[16]

The 5-to-4 vote in *Guernsey* illustrates well that determining whether a particular rule is substantive or interpretative is often a difficult, fact-intensive, undertaking. But the difficulty does not stem from any disagreement on the governing legal standard. As Judge Wald has put it:

> Determining whether a given agency action is interpretive or legislative is an extraordinarily case-specific endeavor . . . . [A]nalogizing to prior cases is often of limited utility in light of the exceptional degree to which decisions in this doctrinal area turn on their precise facts.

American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

This observation applies perfectly here. The D.C. Circuit carefully reviewed the record and, applying settled law, held that the interpretation of the comparable sightlines regulation in the *Technical Assistance Manual* was valid. Because

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[16] *See also Stinson v. United States*, 508 U.S. 36, 38 (1993) ("commentary in the Guidelines Manual that interprets or *explains a guideline* is" an interpretative rule entitled to deference) (emphasis added).

Petitioners are unable to show any real debate on the applicable legal standard, and do not challenge the D.C. Circuit's application of the law to the complex facts of this case, the Petition should be denied.

III. THIS CASE IS A POOR VEHICLE FOR CONSIDERING THE QUESTIONS PRESENTED.

Even if Petitioners were able to identify an actual circuit split on either of their questions presented, this Court should decline to grant a writ of certiorari for at least four independent reasons.

First, the "undulated interplay," A. 42a, between the Access Board and the Justice Department—in which the Access Board sets the foundation upon which the Department builds its regulation—is rare, if not unique. *See* p. 3-4, *supra*. In the lower courts, Petitioners focused much of their attack on this unusual relationship, arguing that deference is not due the Justice Department's interpretation of a regulation supposedly authored by another agency. *See, e.g.*, Brief for Appellants, U.S.C.A, D.C. Cir., at 2, 19-23, 43-45. The District Court rejected Petitioners' argument, A. 45a-47a, as did the Court of Appeals, A. 12a-13a, and Petitioners do not ask this Court to consider the issue. *See* Pet. at i. Nonetheless, even though the regulation at issue in this case is unquestionably the Justice Department's own, the "interplay" between the Access Board and the Department in the creation of the Title III regulation produced an extensive administrative record that is not nearly as "clear and simple," Pet. at 10, as Petitioners suggest.

Second, the interpretation challenged by Petitioners appears in the Justice Department's *Technical Assistance Manual*, the means chosen by Congress for the Department to interpret its Title III regulation. *See Ford Motor Credit*, *supra*, 444 U.S. at 563 & n.8. The Assistant Attorney General for Civil Rights specifically approved the *Manual*, including the September 1994 update that contained the interpretation of the comparable sightlines regulation.

C.A.A. 1387-94. Because of the degree of formality associated with the Department's interpretation of its regulation, this case does not present the typical situation in which an agency seeks deference to an interpretation expressed in a less formal setting. *E.g. Auer*, 117 S. Ct. at 911 (*amicus* brief); *Seminole Rock*, 325 U.S. at 417 ("bulletin"). It thus would not provide a suitable vehicle for the Court to consider what deference is due truly informal agency interpretations.

Third, the fundamental issue in this case—namely, whether the courts should defer to the Justice Department's interpretation of its comparable sightlines regulation—is currently being litigated in at least three circuits. One district court has agreed with the D.C. Circuit's holding, *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997), one has disagreed, *Caruso v. Blockbuster-Sony Music Entertainment Ctr.*, 968 F. Supp. 210 (D.N.J. 1997), and one has staked out a middle ground, *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698 (D. Ore. 1997). To date, the D.C. Circuit is the only appellate court to have considered the issue, although the *Caruso* case is currently on appeal to the Third Circuit. *Caruso v. Blockbuster-Sony Music Entertainment Ctr.*, No. 97-5764 (3d Cir.). It is premature for this Court to review this issue while it is still moving through the lower courts, particularly when there have been no inconsistent results at the appellate level.

Finally, the Justice Department's comparable sightlines regulation is due for an overhaul in the near future. The Access Board has already begun work on revising its minimum guidelines in this area. In July 1994, the Board published, as an Advanced Notice of Proposed Rulemaking, 59 Fed. Reg. 48542 (1994), its Recreation Access Advisory Committee's *Recommendations for Accessibility Guidelines* that specifically addressed the issue "comparable sightlines in sports facilities." *Recommendations* at 42-43. In September 1996, the Access Board's specially convened

Federal Advisory Committee issued its *Recommendations for a New ADAAG*, which also addresses (in Section 802.8) the sightlines issue. The Access Board is due to issue a Notice of Proposed Rulemaking based on these reports "in the summer of 1998." 3 ACCESS CURRENTS at 3 (Nov./Dec. 1997). Given that the Justice Department's Title III regulations must "be consistent with" the Board's guidelines, 42 U.S.C. § 12186(c), the Justice Department is expected to initiate rulemaking revisions at the same time. As a result of this ongoing regulatory activity, whatever decision this Court renders if it accepts this case for review may quickly prove to be irrelevant.

CONCLUSION

For the above-stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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